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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

ANDREW J. WINSTON, Sheriff,
City of Richmond,

and

DON HUTTO, Director of
Department of Corrections,

Petitioners,

v.

ROBERT G. EBY

and

FRANKLIN M. PHILLIPS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Does a master jury list composed of twenty-five percent women meet the fair-cross-section of the community requirements of the Sixth Amendment?

II. Does the exemption from jury service of persons necessarily and personally responsible for children sixteen years of age or younger represent a significant state interest to justify a failure to attain a fair-cross-section of the community under the Sixth Amendment?

III. Did the respondents make out a *prima facie* case of jury discrimination?

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is included herein as Appendix A. The decisions of the United States District Court are included herein as Appendix B.

JURISDICTION

The decision of the Court of Appeals was entered on November 12, 1980. The jurisdiction of this Court to issue the Writ of Certiorari in this case is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. United States Constitution, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 8-208.6(26) of the Code of Virginia (1950), as amended.

§ 8-208.6. The following shall be exempt from serving on juries in civil and criminal cases:

* * *

(26) Any persons who notify the jury commissioners within the time and in the manner prescribed by § 8-208.10 that they have legal custody of and are necessarily and personally responsible for a child or children sixteen years of age or younger or a person having a physical or mental impairment requiring continuous care by them during normal court hours.

3. Section 8-208.10 of the Code of Virginia (1950), as amended.

§ 8-208.10. The commissioners shall, not later than the first day of December following their appointment, submit a list

showing the names, addresses and, if available, the occupations of such of the inhabitants of their respective counties or cities as are well qualified to serve as jurors and are not excluded or exempt by §§ 8-208.2, 8-208.3, 8-208.4 and 8-208.6, such list to become effective January first following. The number of persons selected for each court shall be as specified in the order appointing the commissioners.

* * *

STATEMENT OF THE CASE

The respondents were charged with possession of several tons of marijuana with intent to distribute. Prior to trial in the Circuit Court of Hanover County, Virginia, the respondents filed a Motion to Quash the master jury list on the ground of systematic exclusion of women. The respondents entered into a stipulation with the State prosecutor that the 1970 census indicated approximately fifty percent women in the adult population in Hanover County. The stipulation also included that the 1976 and 1977 master jury lists contained twenty-five percent women. When the stipulation was presented at trial the State judge questioned the reliability of the percentage of women on the 1976 and 1977 master jury lists when it was shown that these percentages had been arrived at by merely looking at the master jury list and assuming certain names were male and others were female. The State trial judge rejected this stipulation as being unreliable and not accurately reflecting the facts. Thereafter the trial judge denied the Motion to Quash the master jury list and respondents were subsequently convicted. The respondents appealed their conviction to the Supreme Court of Virginia where they raised the issue of jury discrimination. This appeal was denied by the Supreme Court of Virginia. The respondents unsuccessfully sought Certiorari in this Court which was denied on March 19, 1979, Case No. 78-5796.

After exhausting State court remedies, the respondents filed a petition for a Writ of Habeas Corpus in the United States District Court, asserting among other things the issue of jury

discrimination. Argument was had before the District Court on August 20, 1979, at which time no evidence was presented. The petitioners filed the affidavits of two former jury commissioners explaining that when arriving at the names to be placed upon the master jury list they did not consider an undetermined number of women who they personally knew had to care for infant children. On December 17, 1979, the District Court granted respondents a Writ of Habeas Corpus on the ground that they had been denied a jury composed of a fair-cross-section of the community in violation of the Sixth Amendment and upon another ground which was not considered by the Circuit Court of Appeals.

ARGUMENT

I

A MASTER JURY LIST COMPOSED OF TWENTY-FIVE PERCENT WOMEN REPRESENTS A FAIR-CROSS-SECTION OF THE COMMUNITY UNDER THE SIXTH AMENDMENT.

In *Duren* v. *Missouri*, 439 U.S. 357 (1979), this Court held that the fair-cross-section requirement of the Sixth Amendment was violated where jury venires averaged less than 15% women. This Court did not undertake to decide what percentage of women serving on juries would comport with the Sixth Amendment. This case presents this Court with the opportunity to answer this very question which was left open in *Duren*.

As noted by Justice Rehnquist in his dissent in *Duren*, the States need a more definitive guideline in this area in order to avoid the unhappy prospect of having convictions set aside.

The Sixth Amendment's focus is primarily upon a defendant's right to be tried by a jury fairly representative of the community, and not with the right of a particular group to be included in the jury pool. *See, Williams* v. *Florida*, 399 U.S. 78 (1970). Therefore, the standards under the Sixth Amendment and under the Equal Protection Clause differ, and the Sixth Amendment standards are somewhat more flexible. *See, United States* v. *Hanson*, 472 F.Supp. 1049 (D. Minn. 1979).

This flexibility approach to Sixth Amendment cases was recognized by this Court in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), when the Court observed:

> "The fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury list or panel are representative of the community." 419 U.S. at 538.

Finally, this Court emphasized:

> "That in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." 419 U.S. at 538.

In *Duren* this Court found that less than one of every six prospective jurors was female, and that the disparity of almost 40% between the percentage of women in the jury venires and the percentage of women in the community required the conclusion that women were not fairly represented. Contrasting *Duren* with the present case one finds that one of every four prospective jurors was female and that the disparity between the percentage of women on the master jury lists and the percentage of women in the community was 25%.

Such figures compare favorably with figures approved by other Courts. In *People* v. *Hill*, 415 N.Y. Supp.2d 541 (1979), the defendant alleged that the jury venires were 30% women whereas the percentage of women in the county was 53%, a 23% disparity. The New York Court held such figures failed to establish a *prima facie* case. In *Williams* v. *Dalsheim*, 480 F. Supp. 1049 (E.D.N.Y. 1979), the Court found that jury venires averaging approximately 33% female did not violate the Constitution's fair-cross-section requirement where women at the time constituted 54% of the population. Likewise, the Supreme Court of Georgia in *Bowen* v. *State*, 260 S.E.2d 855 (1979), found no violation of the fair-cross-section requirement where the jury panel indicated 29.5% females where the population

was 54.2% female. Additionally, the Court of Appeals for Missouri found that a jury panel of 27.9% women did not show a violation of the principles set forth in *Duren*. *See, Stamps* v. *State,* 603 S.W.2d 59 (1980).

In the present case, one in every four persons on the master jury list was a female. Can it be said that such a percentage fails to provide a fair-cross-section of women on juries? What can possibly distinguish a jury list consisting of 25% women from one that consists of 27.9% or 29.5% found sufficient in *Stamps* and *Bowen, supra*?

The District Court's opinion of December 17, 1979, finding that the respondents' jury was composed of only 17% females is misleading. The panel of twenty jurors from which respondents' jury was chosen contained four females, two of whom were struck through the use of peremptory challenges. Additionally, the respondents agreed to excuse two other women from the venire prior to obtaining the panel of twenty. Therefore, had these two women not been excused, and had the peremptory strikes not excluded two additional women, the respondents' jury would have been composed of 50% women.

It is submitted that a jury list composed of 25% women comports with the fair-cross-section requirements of the Sixth Amendment.

ARGUMENT

II

THE EXEMPTION FROM JURY SERVICE OF PERSONS NECESSARILY AND PERSONALLY RESPONSIBLE FOR CHILDREN SIXTEEN YEARS OF AGE OR YOUNGER REPRESENTS A SIGNIFICANT STATE INTEREST AND JUSTIFIED A FAILURE TO ATTAIN A FAIR-CROSS-SECTION OF THE COMMUNITY UNDER THE SIXTH AMENDMENT.

In *Duren* this Court noted that the demonstration of a *prima facie* fair-cross-section violation by the defendants is not

the end of the inquiry into whether a constitutional violation has occurred. This Court explained:

> "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury list or panel are representative of the community. . . . However, we caution that '[t]he right to a proper jury cannot be overcome on merely rational grounds,' . . . . Rather, it requires that a significant State interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." 99 S.Ct. at 670.

In expanding upon this holding this Court observed that States may have an important interest in assuring that persons responsible for the care of children are available to do so, and that an exemption appropriately tailored to accomplish this purpose would survive a fair-cross-section challenge.

The Legislature of Virginia has adopted just such an exemption. At the time of respondents' trial §8-208.6(26) authorized the exemption of not only women but *any* persons that have legal custody of and who are personally responsible for a child or children sixteen years of age or under. Surely, the State has a significant interest in assuring that young children are properly cared for and that persons having this responsibility are available to do so.

The petitioners submitted affidavits of two of the Jury Commissioners during the relative period who stated that in considering names of persons to be placed on the master jury list they did not place on the list the names of some women whom they knew had to care for infant children. These affidavits were uncontradicted and petitioners assert that any disparity of women appearing on the master jury list was directly related to their responsibility for the care and custody of minor children.

As noted by the District Court, the Commissioners, rather than the individual women, claimed the exemption. While it is true that the Commissioners did not follow applicable State law

for exempting these women, this merely raises a question of State law and does not implicate any constitutional claims. It is uncontradicted that the Jury Commissioners did not exempt all women, but only those whom they personally knew to have the individual responsibility to care for infant children. The reasons for the exemption for the women in this case is constitutionally permissible under *Duren,* and demonstrates that this exemption caused the underrepresentation complained of. The evidence in this case stands in stark contrast to *Duren* where the record contained no proof that the exemptions caused the underrepresentation. The petitioners submit that the exemption of women who were directly responsible for the care of infant children establishes that the attainment of a fair-cross-section was incompatible with a significant State interest.

ARGUMENT

III

THE RESPONDENTS FAILED TO MAKE OUT A *PRIMA FACIE* CASE OF JURY DISCRIMINATION.

In the District Court the respondents relied solely upon the State Court records as they presented no additional evidence. The State Court records showed that during the trial the respondents entered into a stipulation with the State prosecutor that the 1970 census showed approximately 50% women in the County and that the 1976 and 1977 master jury lists were composed of 25% women. From the outset the State trial judge questioned the reliability of the figures used in the stipulations. When advised that the figures used to show the number of men and women on the master jury lists were obtained by merely scanning the lists to see whether it was a man's or a woman's name, the trial judge indicated his doubts that such a procedure would be reliable. The State judge pointed out deficiencies in this method of trying to determine the sex of the persons on the master jury lists. The trial judge advised the parties that the stipulations were not absolute facts and he would have to take that into consideration. The State judge was critical of the manner the parties had used to arrive at the stipulation and

advised that he did not know how much attention he was going to pay to the stipulation. The State trial judge denied the Motion to Quash the master jury lists and in so doing rejected the stipulations as proving the facts.

During the course of the proceedings in the District Court the District Court disagreed with the petitioners' interpretation of the trial transcript and based its opinion on the assumption that the State trial court had accepted the stipulation as to what the best available evidence would show. In order to clarify any question regarding the weight given the stipulation, the petitioners filed the affidavit of the State court trial judge where he expressly stated that he had not accepted the stipulation as being what the best evidence would show and further that he found that the figures were not obtained in a reliable manner.

The finding by the State court that the figures representing the number of women on the master jury lists were unreliable is presumed to be correct. 28 U.S.C. §2254(d); *Wright* v. *North Carolina*, 483 F.2d 405 (4th Cir. 1973). The burden was thus on respondents to establish in the District Court by convincing evidence that the State court's determination was erroneous. *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973).

The respondents might well have requested an evidentiary hearing in the District Court in order to establish their claim by reliable evidence, but they chose not to do so. *See, Brewer* v. *Williams*, 430 U.S. 387 (1977).

The District Court held that the petitioners were bound by the stipulation in the face of the State trial court's affidavit that it had rejected the stipulation as being unreliable.

A trial court is not bound by stipulations of fact which appear contrary to facts disclosed by the record. *Mead's Bakery, Inc.* v. *C.I.R.*, 364 F.2d 101 (5th Cir. 1966). Additionally, a stipulation by counsel originally designed to expedite the trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice upon one of the contracting parties. *Maryland Casualty Co.* v. *Rickenbaker*, 146 F.2d 751 (4th Cir. 1944).

To hold the petitioners to the stipulation which they did not enter, and which was rejected by the State trial court as being unreliable, would inflict a manifest injustice upon the petitioners. To allow the respondents to use the unreliable stipulation is to grant them relief upon evidence which is untrustworthy.

Since the State trial court's rejections of the stipulation regarding the number of women on the master jury lists is presumed to be correct, and the respondents having presented no reliable evidence to establish a *prima facie* case, the District Court erred in granting the Writ of Habeas Corpus and this decision should not have been affirmed by the Circuit Court of Appeals.

CONCLUSION

This case raises serious questions of Federal law which go to the very heart of the jury system operated by the States. Guidance by this Court in this sensitive area of State and Federal relations is necessary to avoid reversals of what purport to be valid State Court convictions.

For the foregoing reasons, Certiorari should be granted, and the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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830 East Main Street
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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, of Counsel for the Petitioners, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10th day of February, 1981, I mailed a copy of the foregoing petition for Writ of Certiorari to Michael Morchower, Esquire, 13 East Franklin Street, Richmond, Virginia 23219, Counsel of Record for Respondents.

James E. Kulp
Deputy Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-6176

ROBERT G. EBY,
FRANKLIN M. PHILLIPS,

Appellees,

-v-

ANDREW J. WINSTON, Sheriff, City of Richmond;
DON HUTTO, Director of Department of Corrections;
MARSHALL COLEMAN, Attorney General of Virginia,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Judge.

Argued October 10, 1980 Decided November 12, 1980

PER CURIAM:

The Commonwealth of Virginia appeals the judgment of the district court granting Robert Eby and Franklin Phillips writs of habeas corpus. The district court found that the jury selection process employed in connection with their state court trial systematically excluded women in violation of Eby and Phillip's Sixth and Fourteenth Amendment rights. Alternately, the court based its issuance of the writ on a statement by the prosecutor in his summation.

Upon consideration of the record, briefs, and oral argument, we conclude that the district court correctly granted the writs because of systematic underrepresentation of women on the master jury list and their jury panel. *See* Duren v. Missouri, 439 U.S. 357, 363, 370 (1979). We affirm on this issue for reasons adequately stated by the district court. Winston v. Eby, No. 79-0543 (E.D. Va. Dec. 17, 1979).* Because we hold that the judgment was correctly based on this issue, we need not reach the alternate ground for issuance of the writ.

AFFIRMED.

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* Inasmuch as the statistics concerning the composition of the master list and jury panel were presented to the state court by stipulation applicable only to this prosecution, our affirmance of the district court's judgment does not constitute precedent for other cases tried in the state court.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 79-0543-R

ROBERT G. EBY

and

FRANKLIN M. PHILLIPS,

Petitioners,

v.

ANDREW J. WINSTON, et al.,

Respondents.

MEMORANDUM

Petitioners, Robert G. Eby and Franklin M. Phillips, inmates of the Commonwealth of Virginia's penal system, seek a writ of habeas corpus under 28 U.S.C. §2254. Petitioners advance several challenges to their conviction in the Circuit Court of Hanover County, Virginia for possession of marijuana with the intent to distribute. Defendant Winston is Sheriff of the City of Richmond, in charge of the City of Richmond jail to which the petitioners have been assigned for the serving of their respective sentences. Marshall Coleman is the Attorney General of the Commonwealth of Virginia. Subject matter jurisdiction is vested in this Court pursuant to 28 U.S.C. §2241.

The petition first challenges the jury selection scheme employed by Hanover County in connection with petitioners' trial; contending that the scheme systematically excluded women and young adults,[1] in violation of petitioners' rights under

[1] "Young adults", for purposes of this memorandum, describes those persons between the ages of eighteen and twenty-nine. This is in accordance with petitioners' use of the term and corresponds to the ages at which a person becomes eligible for jury service and the age of petitioner Eby.

the Sixth and Fourteenth Amendments to the Constitution of the United States.

Petitioners also allege a denial of their rights secured by the Fifth and Fourteenth Amendments; premised upon the prosecution's alleged comment upon petitioner Eby's failure to testify at trial.

Petitioners, additionally, attack their conviction under the Fourteenth Amendment's due process guarantee of a fair trial, contending that certain statements of the Commonwealth Attorney were prejudicial and inflammatory. Petitioners lastly contend[2] that they were denied a fair trial by reason of the state court's exclusion of expert pharmacological evidence concerning marijuana.

Respondents have answered the petition, denying its operative paragraphs. The Court has considered, in addition to the state court record, affidavits offered by respondents from two jury commissioners who served at the time of petitioners' trial, has heard the argument of counsel, and having been twice advised that none of the parties have any further evidence to offer, the matter is ripe for disposition.[3]

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[2] The petition originally sought habeas relief upon the basis of an unconstitutional arrest, search and seizure as well as the grounds noted in the text. These allegations were dismissed with prejudice on July 18, 1979 upon motion of petitioners.

[3] The answer denied that petitioners had established a prima facie challenge to the jury selection scheme. The answer then stated, "Respondents reserve the right to present evidence on the issue of jury selection should the petitioners make out a prima facie case of discrimination." In disposing of the petition at this time the Court emphasizes several points. First, the "reservation" is contrary to the directive of Fed.R.Civ.P. 12(b) which provides, in pertinent part:

> *Every defense, in law or fact, to a claim for relief* in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, *shall be asserted in the responsive pleading thereto.* . . . (emphasis added).

Further, respondents did not choose to supplement the record or submit rebuttal pleadings as authorized by the Court in its orders of November 19, 1979 and December 10, 1979. Third, the "reservation", by its terms, is limited to rebutting a prima facie showing of discrimination. Because of the Court's views in this case, the "reservation" could not have become significant.

I.

The jury which convicted petitioners was selected under a "key man" system pursuant to Va. Code Ann. §8-208.10 (Cum. Supp. 1976). Each of the five jury commissioners appointed under Va. Code Ann. §8-208.8 (Cum. Supp. 1976) selected seventy to eighty potential jurors and, after comparing the lists to avoid duplication, the individual lists were combined to comprise the master jury list.

In formulating their individual lists the jury commissioners tended to select persons known to them. It does not appear from the record that the commissioners were authorized to employ random selection techniques under the optional alternative of §8-208.10, of the Va. Code.[4]

Four of the jury commissioners who selected the master jury list relevant to this action were males, and the same number were at least fifty-four years of age. Petitioners place special emphasis upon these facts in light of the commissioners' practice of selecting persons known to them.

The 1970 census statistics indicate that approximately 50% of the adult population of Hanover County was female. Petitioners argue, and respondents do not deny, that the master jury lists used in 1976 and 1977 were only 25% female. Two of the twelve persons impaneled as jurors at petitioners' trial, or 17% of the panel, were females.

The same census figures aforementioned reveal that 20% of the adult population of Hanover County was between the ages of eighteen and twenty-nine years. It was stipulated by the parties that of the 89% of the persons on the master jury list whose ages could be determined, only 6% were young adults.

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[4] Va. Code Ann. § 8-208.10 (Cum. Supp. 1976) reads in pertinent part:

> When authorized by the chief judge of the Circuit, the jury commissioners may utilize random selection techniques, either manual, mechanical or electronic, using a current voter registration list and other such lists as may be approved by the judge, to select jurors to be placed on the master jury list. . . .

The Court first addresses petitioners' Sixth Amendment claims. While that amendment guarantees, *inter alia*, trial by a jury representing a fair cross-section of the community, there is no requirement that the jury be a statistical mirror of the community. *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Hoyt* v. *Florida*, 368 U.S. 57 (1961) *overruled on other grounds, Taylor* v. *Louisiana*, 419 U.S. 522 (1975). Indeed, the states have been afforded considerable latitude in their attempts to meet the fair cross-section requirement. *See, e.g. Brown* v. *Allen*, 344 U.S. 443, 473-474 (1953), *overruled on other grounds, Townsend* v. *Sain*, 372 U.S. 293 (1963). It is within this context that the Court considers the merits of the petition.

The Court is satisfied that petitioners have established a prima facie case with regard to the underrepresentation of women on the master jury list and their jury panel. In reaching this conclusion the Court is guided by *Duren* v. *Missouri*, 439 U.S. 357 (1979). *Duren* set forth the elements of a prima facie fair cross-section case thusly:

> . . . The [petitioner] must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, supra at 364. It is these requirements which must be applied to the facts of the instant case.

There can be no doubt that petitioners have established the first element of the prima facie case. Women are a cognizable group for Sixth Amendment cross-section purposes. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). As reiterated in *Duren*, women "are sufficiently numerous and distinct from men" so that "if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." *Duren, supra* at 364, quoting *Taylor, supra* at 531.

Petitioners have shown the underrepresentation of women by their unrefuted statistics comparing the gender composition of the community with the master jury lists and their jury panel. While this is not a matter which can be reduced to specific numerical standards, the Court notes that the statistical evidence in the instant case is comparable to that in *Duren.*[5] *See also, Stephens* v. *Cox,* 449 F.2d 657 (4th Cir. 1971). (Two-to-one disparity in racial composition of community and jury, when coupled with proof of "an opportunity for discrimination," establishes a prima facie case of racial discrimination.)

The state court records, the statistical evidence and the affidavits demonstrate the requisite systematic exclusion of women. As previously stated, the jury commissioners tended to select persons known to them. At least two commissioners, as evidenced by their affidavits, purposely did not select women whom they knew to be caring for children. The opportunity to exclude women, and indeed, actual exclusion of some, was thus shown. As in *Duren,* the underrepresentation occurred in roughly the same proportion during consecutive periods. Further, petitioners have shown at what stage of the selection process the exclusion occurred.

Having satisfied the three-part test of *Duren,* petitioners have established an unrebutted case of denial of a jury composed of a fair cross-section of the community.

Respondents' response to the present challenge was a mere denial. Upon the Court's invitation, twice made, to supplement the record to rebut the evidence, respondents cited *Rose* v. *Mitchell,* U.S. , 47 L.W. 4948 (1979), and advised the Court that there were "no further matters to supplement the record in this case." Respondents contend that *Rose,* which dealt with alleged racial discrimination in the selection of a

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[5] In *Duren* the census data revealed that 54% of the adult population of Jackson County, Missouri was female. Petitioner there showed that 26.7% of those summonsed for jury duty were women and that only 14.5% of the venire was female.

Grand Jury and its Foreman, supports their position that petitioners have not met their burden of proving a prima facie case. The Court disagrees.

Respondents' reliance upon *Rose* is misplaced. At the outset it should be noted that *Rose* addressed the jury composition issue from the perspective of the equal protection clause of the Fourteenth Amendment.[6] The elements of a prima facie equal protection case, while similar to the Sixth Amendment's requirements, are not identical. In *Rose* these elements were said to be:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve . . . *over a significant period of time* . . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption raised by the statistical showing.

Rose, supra at 4954, quoting *Castaneda* v. *Partida*, 430 U.S. 482, 495 (1977) (emphasis added). Respondents, during oral argument, challenged the sufficiency of petitioners' statistical evidence in light of the requirement emphasized in the passage from *Rose*, a contention which warrants careful consideration.

In *Rose* the Court found insufficient evidence tending to show the jury foreman selection practices for at least five or six years during the period from 1951 to 1973. The Court stated:

> Thus, even assuming that the period 1951-1973 is the significant one for purposes of this case, respondents'

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[6] The fact that *Rose* involved an equal protection, rather than Sixth Amendment challenge suggests that it might more appropriately be addressed, *infra*. Two factors counsel the course adopted by the Court. First, *Rose* is the only authority which respondents asserted in the pleadings. Second, the Court does not address petitioners' equal protection challenge to the underrepresentation of women and, hence, *Rose* must be addressed at this stage, if at all.

> evidence covered only portions of that time and left a number of years during that period about which no evidence whatsoever was offered.

Rose, supra at 4955. We may assume, as respondents maintain, that pursuant to *Rose,* petitioners' evidence in the instant case was insufficient to make out a prima facie case under the equal protection clause. That assumption does not alter the Court's view of the merits of the Sixth Amendment challenge, however. *Duren* did not require that the underrepresentation be shown "over a significant period of time." Indeed, the evidence in *Duren* covered a period *less* than the two year period of the instant case.[7]

Once petitioners established, as they have, a prima facie case of infringement of their Sixth Amendment right, the burden shifted to respondents. Respondents' task was difficult, for the burden was to demonstrate that attainment of a fair cross-section jury was "incompatible with a significant state interest." *Duren, supra* at 367. As in *Duren,* respondents have offered no such justification. *See* n.3, *supra.* Accordingly, petitioners are entitled to relief upon this ground.

Petitioners' challenge to their jury's composition premised upon the underrepresentation of young adults must be rejected. Young adults, despite petitioners' arguments to the contrary, are not a cognizable group for purposes of the Sixth Amendment's fair cross-section requirements. Petitioners have thus not satisfied the first element of *Duren's* prima facie case.

In *United States* v. *DiTommaso,* 405 F.2d 385 (4th Cir. 1968), *cert. denied* 394 U.S. 934 (1969), the defendant challenged the composition of the grand and petit juries which indicted and convicted him. The challenge was premised upon the underrepresentation of certain groups upon the basis of age, sex, geography, occupation and education. With regard to the first classification the Fourth Circuit Court of Appeals spoke unambiguously:

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[7] *Duren* produced evidence of the gender composition of juries serving for two periods: June-October 1975 and January-March 1976.

> As to age as a measure of representation, we do not believe that members of arbitrarily drawn age brackets necessarily constitute valid categories for measuring the legality of jury selection.

DiTommaso, supra at 391. *DiTommaso* is in accord with the weight of authority. *See Reed* v. *Wainwright*, 587 F.2d 260 (5th Cir. 1979); *United States* v. *Test*, 550 F.2d 577 (10th Cir. 1976); *United States* v. *Geelan*, 509 F.2d 737 (8th Cir. 1974), *cert. denied sub nom. Moore* v. *United States*, 421 U.S. 999 (1975); *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972); *United States* v. *Gusman*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied* 410 U.S. 970 (1973); and *United States* v. *Ross*, 468 F.2d 1213 (9th Cir. 1972), *cert. denied* 410 U.S. 989 (1973) *Overruled on other grounds, United States* v. *Brady*, 519 F.2d 1121 (9th Cir. 1978).

To the extent the issue is not resolved by *DiTommaso*, petitioners cite the case of *United States* v. *Butera*, 420 F.2d 564 (1st Cir. 1970). In *Butera* the Court concluded that young adults are a cognizable group for purposes of a prima facie case under the fair cross-section protection. Petitioners rely upon the following language of the First Circuit:

> We cannot allow the requirement of a "distinct" group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons—in our case those between 21 and 34 will be insulated from attack.

Butera, supra at 570. The *Butera* Court, additionally, noted that if there is a "generation gap", then its influences should be represented on the jury. Petitioners contend that this rationale is especially convincing in a case involving the possession or distribution of marijuana.

The Court declines to adopt the reasoning of *Butera*. First, the Court is of the opinion that young adults are not properly described as a cognizable group. A cognizable or distinct group is one which: (1) Possesses some quality or attribute which defines and limits the group; (2) demonstrates a cohesiveness of ideas, attitudes or experiences which distinguishes the group;

and (3) shares a community of interest which may not be represented by other societal groups. *United States* v. *Test, supra.* A group such as young adults, which is defined solely by age, does not possess the aforementioned characteristics. Individuals of the same age group will not necessarily share a community of interest. There will also be vast variations in attitudes, experiences and opinions among those within the same age group. *Gusman, supra* at 146.

Second, the Court is of the opinion that *Butera* should not be extended beyond the extreme factual situation presented therein. Young adults were there treated as a cognizable group largely because each age group below forty was underrepresented while each age group above forty years was overrepresented. It was this continuum of over- and underrepresentation, and not the statistics for a particular age group, which supported the Court's conclusion. Petitioners have shown no analogous pattern in the instant case. In any event, this Court is bound by its Court of Appeals' pronouncements on the subject. *See, United States* v. *DiTommaso, supra.*

For all of the aforementioned reasons, the petitioners' Sixth Amendment challenge premised upon the underrepresentation of young adults must be rejected.

II.

Petitioners also challenge the Hanover County jury selection scheme under the due process and equal protection clauses of the Fourteenth Amendment. As with the Sixth Amendment claims, these allegations rest upon the underrepresentation of women and young adults. There can be no doubt that petitioners possess the requisite standing to assert these claims even if they are not members of the class which is discriminated against. *Peters* v. *Kiff*, 407 U.S. 493 (1972).

As a general rule the Court customarily attempts to fully address each claim asserted in a petition for habeas corpus relief. With regard to the underrepresentation of women, however, this would entail unnecessary consideration of an

issue under the Fourteenth Amendment. The Court has determined that petitioners are entitled to relief under the Sixth Amendment. The due process and equal protection challenges are identical to the Sixth Amendment issue in terms of the jury composition and the relief sought. No purpose would be served by consideration of the Fourteenth Amendment claim and, therefore, in this context, none will be given in regard to the underrepresentation of women.

The Fourteenth Amendment claim with regard to the underrepresentation of young adults has, however, been considered and found to be without merit. Underrepresentation of a cognizable group is an element of the prima facie case both under the Sixth and Fourteenth Amendments. The distinctions between the prima facie case under these separate protections do not affect the definition of a cognizable group. Accordingly, what was previously stated under I, *supra* applies with equal force to the present claim. Additionally the statistical evidence is insufficient to establish a practice of discrimination under *Rose, supra.* The petitioners' equal protection and due process claims must, therefore, be rejected.

III

The petition's sixth paragraph alleges that petitioners' Fifth and Fourteenth Amendment rights were abridged by reason of the prosecution's closing argument. The Fifth Amendment provides, in pertinent part, that "No person. . . shall be compelled in any criminal case to be a witness against himself. . . ." The protection from compulsory self-incrimination is, of course, made applicable to state proceedings through the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U.S. 1 (1964)

Implicit in the Fifth Amendment guarantee is the accused's right to choose not to testify without fear of penalty for invoking the privilege. *Griffin* v. *California,* 380 U.S. 609 (1965). One penalty from which the accused is protected is comment upon his silence by the prosecution. *Id.*

Petitioners contend that the following statement, made by the prosecutor, constituted a comment upon their failure to testify:

> Mr. Robbins said that they were to deliver the marijuana to a point in the United States. He didn't know the destination, but he said that Mr. Eby was the pilot. He said that they were to land this plane somewhere in the United States for distribution. . . .
>
> I asked him how much he was supposed to get out of his—for his part in the, uh, caper. He said forty thousand dollars. I asked him about Mr. Eby. He said forty percent of the entire take. I don't know how much that is because Mr. Robbins didn't know how much it was. Only Mr. Eby can answer that question.

Tr. at 2153. Initially, the Court must consider whether this statement constituted an impermissible comment upon petitioner Eby's silence. If that question be answered in the affirmative, the Court must further consider whether petitioner Phillips is entitled to relief on this ground.

A common problem presented in issues such as the instant one involves distinguishing impermissible comment upon the accused's silence and proper argument upon the evidence. *United States* v. *Johnson*, 337 F.2d 180 (4th Cir. 1964), *aff'd* 383 U.S. 169 (1966); and *United States* v. *Borda*, 285 F.2d 405 (4th Cir.), *cert. denied* 365 U.S. 844 (1961), are illustrative of the permissible scope of closing argument.

In *Johnson* one of four defendants argued that the prosecution had commented upon his failure to testify. The challenged remark was to the effect that the government's witnesses and other evidence established defendant's involvement in the alleged conspiracy and that defendant had offered no evidence on his behalf. The United States Court of Appeals for the Fourth Circuit found this argument unobjectionable since it merely reviewed the evidence and truthfully concluded that the government's case stood uncontradicted. *Johnson, supra* at 203; citing *Davis* v. *United States*, 279 F.2d 127 (4th Cir.), *cert. denied sub nom., Cope* v. *United States*, 364 U.S. 822 (1960).

United States v. *Borda*, supra, was an identical challenge to the prosecutor's summarization of and comment upon a witness' testimony. A witness had testified as to a conversation he had with the defendant in the former's hotel room. The prosecutor commented that the witness' testimony was uncontradicted. The Court of Appeals rejected defendant's challenge because: (1) The witness' wife was present and could have been called to contradict her husband's testimony or (2) the defendant could have offered evidence to support his claim of never being in the hotel room. Each possibility interrupted the syllogism advanced by the defendant.

In the instant case it is apparent that most of the prosecutor's argument set out above is permissible under *Johnson*. But for the last sentence of the passage the prosecuting attorney merely summarized the testimony of Mr. Robbins. The final sentence, however, cannot be so characterized.

The standard for ascertaining when argument of the prosecution represents improper comment on a defendant's failure to testify was well stated in *Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied* 397 U.S. 1050 (1970):

> Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?

This standard has been adopted by the Court of Appeals for the Fourth Circuit. *United States* v. *Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd* 417 U.S. 211 (1974).

The Court is of the opinion that the prosecution's argument constituted a comment upon petitioner Eby's silence. While there has been no suggestion that the remark in question was manifestly intended to comment upon Eby's failure to testify, the Couut is, however, cognizant that *Leak* may be satisfied by an unwitting statement. There can be no doubt that the prosecuting attorney was referring to petitioner Eby for he was identified by name. The statement specifically pointed out that only the petitioner could respond to the inference of the argument. The prosecution was not merely summarizing the

evidence, and thus, *Johnson, supra,* is inapplicable. *Borda, supra,* is distinguishable upon the basis that, "Only Mr. Eby can answer that question." The self-incrimination clause protects against such inferences and petitioner Eby is thus entitled to relief under paragraph six of the petition.

Petitioner Phillips also seeks relief premised upon the comment upon Eby's silence. The Court is satisfied that Phillips is not entitled to relief under the self-incrimination clause. The protection against compulsory self-incrimination is a personal right and Phillips is without standing to assert the denial of Eby's Fifth Amendment right. *United States* v. *Wise,* 603 F.2d 1101 (4th Cir. 1979). *See also, United States* v. *Skolek,* 474 F.2d 582 (10th Cir. 1973) and the cases cited at 584-85.

Nor may petitioner Phillips contend that his own right to silence was abridged by the prosecution's comment. The specific reference to petitioner Eby which rendered the statement objectionable precludes the Court from finding that it was also a comment upon Phillips' silence.

Wise, supra does not, however, end the Couut's inquiry of petitioner Phillips' challenge. Phillips grounds his attack upon fair trial principles rather than the self-incrimination clause. A brief review of *Wise* reveals that the Court of Appeals did not foreclose a petitioner's fair trial attack to a conviction even where he lacks standing to assert the more specific constitutional objections.

In *Wise, supra,* two individuals, Wise and Edmonds, were indicted under the Controlled Substances Act, 21 U.S.C. § 841(a)(1). Edmonds entered into a plea agreement under which he agreed to plead guilty and testify against his codefendant. At Wise's trial Edmonds first attempted to remain silent and then gave false testimony concerning Wise's involvement. On appeal Wise sought relief from his conviction upon the Court's ordering Edmonds to testify. The Fourth Circuit had little difficulty with the challenge.

> The district court ruled that Edmonds had waived his Fifth Amendment privilege by entering into the plea

> agreement requiring him to cooperate with the government and by testifying to his participation in the heroin sale when he entered his guilty plea. We agree. Even if there were doubt whether Edmonds' waiver was knowing and voluntary, we hold that Wise has no standing to assert the violation of Edmonds' Fifth Amendment privilege. *See, e.g., United States* v. *Skolek*, 474 F.2d 582, 584-85 (10th Cir. 1973).[3] *Wise, supra* at 1104.

The Court's footnote 3 suggests that the standing question might have been resolved in Wise's favor "if Edmonds' testimony had been obtained by such coercion as to make it unreliable and thus deny Wise a fair trial." *Id.* The Court is reluctant to read footnote 3 to permit such arguments only where the codefendant's testimony is unreliable. Rather, the Court is of the opinion that the operative portion of footnote 3, and thus that which deserves emphasis, is the reference to the right to a fair trial. The question presented is thus whether the violation of Eby's right to silence so prejudiced Phillips that the latter was denied a fair trial.

The Sixth Circuit addressed this issue under similar facts in *Kinser* v. *Cooper*, 413 F.2d 730 (6th Cir. 1969). In that case, Kinser sought habeas corpus relief from his state conviction for rape. Also indicted and convicted with Kinser (as an aider and abettor) was one Chapman. Kinser testified at trial but Chapman elected to remain silent. Chapman's conviction was reversed upon the prosecutor's comment and jury manual instructions regarding inferences that may be drawn from a defendant's silence at trial.

The Sixth Circuit agreed with Kinser that the comment upon Chapman's silence denied Kinser a fair trial. The Court stressed that an inference of guilt raised as to Chapman necessarily carried over to Kinser. Chapman had been indicted as an aider and abettor; he could not have been convicted unless Kinser committed the substantive offense.

Admittedly, *Kinser* is distinguishable from the instant case. It is readily apparent that the Sixth Circuit was influenced, in large part, by the nature of the case. It was "not like a joint

indictment of two persons for a crime where either one or both may be convicted." *Kinser, supra* at 732. The charge against the petitioners was obviously not of the same character, for petitioners' fortunes were not logically linked together.

The distinction is, however, one without a purpose. The Court is impressed more with the realities of petitioners' trial and the nature of the charge than it is with the absence of a logical connection between the two cases. Petitioners were arrested upon the same event, tried together and represented by the same counsel. More importantly, the only material issue in the case was the presence or absence of intent to distribute the marijuana. *See* Tr. at 2131. Petitioners admitted to possession of the contraband.

The defense strenuously rejected the natural inference of intent to distribute arising from the quantity of marijuana seized. Accordingly, evidence of contemplated sale, if believed, would have been even more probative of the intent to distribute. The impermissible comment by the prosecuting attorney related to the terms of the alleged sale. It is doubtful that the jury would not view evidence of an intended sale by Eby as evidence against Phillips as well. To hold otherwise would countenance an inference as to Phillips which is barred as to Eby. Respondents have not shown why any different conclusion is appropriate.

IV.

Paragraph seven of the petition alleges that the prosecution engaged in prejudicial and inflammatory argument in violation of petitioner's right to a fair trial. A review of the trial transcript and an awareness of the narrow standard for review under 28 U.S.C. § 2254 satisfies the Court that petitioners are not entitled to the relief sought.

Petitioners strenuously challenge three statements made by the prosecuting attorney in his closing argument to the jury. As set out by petitioners the statements are:

> . . . [T]his is a crime against the whole society. We've got a situation where one of the largest

> problems in this country is your drug problem. Tr. at 2164.

and,

> Ladies and gentlemen, this case has received a lot of publicity, but I want you . . . . Tr. at 2166.

and,

> Ladies and gentlemen, these men came in—came into Hanover County and they had a large amount of drugs and the Commonwealth's theory, as I stated in my opening remarks, is they came in to distribute this marijuana to—and that this marijuana would go into the local area . . . . Now these are not your local people. These people are from out of state. Tr. at 2167-68.

The citations to the record demonstrate that the challenged statements followed each other in close succession. Timely objections were made by petitioners' counsel to each of the above-quoted statements.

Petitioners contend that these statements warrant habeas corpus relief for four reasons. It is first argued that the statements inferred that the prosecuting attorney possessed knowledge of matters outside the record. Next, petitioners assert that the statements urged a conviction upon the ground that marijuana is a major problem in the community. Third, petitioners argue that the statements called for conviction because that result was expected by the community. Finally, petitioners maintain that the statements urged the jurors to be "moved by . . . considerations of parochialism." *United States* v. *Diamond*, 561 F.2d 557, 559 (4th Cir. 1977).

There can be little disagreement with petitioners' characterization of the role of the prosecutor in our system of justice. The prosecutor is an agent of the state who must serve both as an advocate seeking to vindicate the public's rights as well as a defender of justice. *See e.g., Berger* v. *United States*, 295 U.S. 78 (1935).

Petitioner's argument, in the Court's view, fails to appreciate the narrow standard against which the petition must be

measured. The allegations of paragraph seven do not raise a denial of a specific constitutional protection but instead argue a denial of the petitioners' right to a fair trial. General, unspecific claims such as those found in paragraph seven present a claim cognizable in the federal courts only when the error is of constitutional magnitude. *Chance* v. *Garrison,* 537 F.2d 1212 (4th Cir. 1976); *Grundler* v. *North Carolina,* 283 F.2d 798 (4th Cir. 1960). Not every error at trial rises to this level; petitioners had a right to a fair trial, not a perfect one. *United States* v. *Curry,* 512 F.2d 1299 (4th Cir.) *cert. denied,* 423 U.S. 832 (1975). The Court's review is thus narrower even than that which is appropriate for direct appeal.

Consideration of the challenges to the statements, individually, reveals that petitioners are of the view that the first statement infers that the prosecutor had knowledge of matters beyond the record. Petitioners' reliance on the cases cited in his memorandum in support of their contention is misplaced, however, for each of those cases is distinguishable from the instant controversy.

Unlike the instant case, *Berger, supra,* presented much more egregious prosecutorial misconduct. There the prosecutor was found to have misstated facts during cross-examination, assumed prejudicial facts which were not in evidence and put answers in the witnesses mouths in addition to implying that he possessed extra-record knowledge. In short, the misconduct of the *Berger* prosecutor was so extreme that it is unpersuasive in the present context.

Nor does *United States* v. *Barker,* 553 F.2d 1013 (6th Cir. 1977), also cited by petitioners, require issuance of the writ on these grounds. In *Barker* the prosecution urged the jury to remember that the defendants were "undesirables" and that law and order could be maintained only if those individuals were convicted. The instant case presents no similar conduct by the prosecuting attorney. Additionally, *Barker* was an appeal from a conviction, not a collateral attack, and it is unclear whether the Sixth Circuit Court of Appeals premised its decision on a constitutional mandate or its supervisory powers over the district court.

Petitioners' challenge to the second above-quoted statement is equally without merit. A review of the transcript demonstrates the importance of considering more than the excerpt set out by petitioners. In a fuller, more revealing excerpt, the argument is as follows:

> [Prosecutor]: Ladies and gentlemen, this case has received a lot of publicity, but I want you—
>
> [Defense]: I'm objecting to that.
>
> [Prosecutor]: —to forget—forget the publicity.

Viewed in this light it is doubtful that the jury would have viewed the statement as suggested by petitioners. Petitioners argue that the remark urged a conviction upon the community's expectation. It is more likely that the jury interpreted the statement as emphasizing their role of making a decision solely upon the evidence. This is in accord with the cases cited by petitioners. *See United States* v. *Corona,* 551 F.2d 1386 (5th Cir. 1977) and *Hale* v. *United States,* 25 F.2d 430 (8th Cir. 1928). Furthermore, any prejudice which might have inured to the petitioners should have been dissipated by the learned trial judge's instructions to disregard the statement.

Petitioners' final argument under paragraph seven challenges the prosecution's remark that they were not residents of either Hanover County or Virginia. Petitioners maintain that this statement encouraged the jury to premise its verdict on considerations of parochialism. *Diamond, supra.* The Court does not believe that *Diamond* is entirely apposite and is satisfied that no error of constitutional proportions was committed.

At the outset it should be noted that the jury was instructed not to be influenced by the prosecution's reference to petitioners' domicile in another state. While the limiting instructions did not come immediately after the statement, the jury was removed during counsel's argument to the court, and the court instructed the jury at its first opportunity. The delay was not objectionable because it was brief, and, at least for the jury, did follow the objection without interruption for consideration of other matters.

Despite the apparent similarities, *Diamond, supra* does not require issuance of the writ on this ground. *Diamond* was an appeal from the sentence imposed by the trial judge. The remarks found to be prejudicial by the Fourth Circuit Court of Appeals were those of the judge, not the prosecutor.

In the instant case, the jury, not the prosecutor who displayed the alleged bias, was charged with determining the penalty upon conviction. Any possible bias which may have resulted to petitioners should have been dispelled by the trial judge's instruction. Obviously, no curative measure would have been realistic under the circumstances of *Diamond, supra.*

For the aforementioned reasons, the Court concludes that the separate statements did not deprive petitioners of the fair trial to which they were entitled. Nor is the Court persuaded that the arguments viewed together rise to the requisite constitutional magnitude. Petitioners' trial lasted two days and the segment of the argument here attacked was a de minimus part of the proceedings. Curative instructions were given promptly after two of the statements. While the Court does not endorse the prosecution's statements exhibited in the heat of a highly contested trial, it cannot conclude that petitioners were denied the fair trial guaranteed by our constitution.

V.

Petitioners further contend that the state court's rulings on admissibility of certain evidence deprived them of the fair trial guaranteed by the due process clause of the Fourteenth Amendment. The proferred evidence was in the nature of expert pharmacological evidence to the effect that marijuana is harmless and not physically addictive.

This claim is totally without merit and thus requires little discussion. Questions of admissibility of evidence are entrusted to the state courts. *Chance* v. *Garrison,* 537 F.2d 1212 (4th Cir. 1976); *Grundler* v. *North Carolina,* 283 F.2d 798 (4th Cir.

1960). No federal question cognizable by this Court is presented unless the error in an evidentiary ruling rises to constitutional magnitude. *Id.* The Court is satisfied that the instant case presents no such error. Indeed, petitioners impliedly recognize this shortcoming in that this claim is expounded only in a footnote in their memorandum in support of the petition. Relief on this claim must therefore be denied.

An appropriate order shall issue.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: 17 Dec. 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 79-0543-R

ROBERT G. EBY,
and
FRANKLIN M. PHILLIPS,
Petitioners,

v.

ANDREW J. WINSTON, *et al.*,
Respondents.

MEMORANDUM

On December 27, 1979, respondents moved the Court to amend its findings and to alter judgment in accordance with Fed.R.Civ.P. 52(b) and 59(e). For the reasons which follow, the Court's memorandum of December 17, 1979 will be amended, in part, and respondents' motion to alter judgment will be denied.

Respondents' contentions will be addressed seriatim.

Respondents first contest the Court's finding that "petitioner's argue, and respondents do not deny, that the master jury lists used in 1976 and 1977 were only twenty-five percent female." The basis for respondents' contention in this regard is premised on their denial in their answers that petitioners had set forth a *prima facie* case. Respondents' answer was neither responsive, nor determinative, to the Court's finding. The answer challenged the legal effect of the anticipated evidence, not the evidence itself.

Respondents continue their objection upon the basis of their August 20, 1979 oral argument. In the Court's view, this

argument is well taken, and the fifth paragraph on page 2 of the Court's memorandum should be amended to read as follows:

> The 1970 census statistics indicate that approximately 50% of the adult population of Hanover County was female. Petitioners argue that the master jury lists used in 1976 and 1977 were only 25% female. Two of the twelve persons impaneled as jurors at petitioners' trial, or 17% of the panel, were females. These figures represent the best available evidence of the gender composition as well as the stipulation entered into by petitioners and the prosecution.

Contrary to respondents' interpretation of the trial transcript, the trial judge did not reject the statistical evidence, but merely emphasized its limitations.

In accordance with respondents' motion and memorandum, paragraph 6 of page 2 of this Court's memorandum should be amended as follows:

> The same census figures aforementioned reveal that 20% of the adult population of Hanover County was between the ages of eighteen and twenty-nine years. At trial, it was stipulated that of the 89% of the persons on the master jury list whose ages could be determined, only 6% were young adults.

Respondents further challenged the memorandum's statement that, "petitioners have shown the underrepresentation of women by their unrefuted statistics comparing the gender composition of the community with the master jury list and the jury panel." In support of this contention, respondents rely upon their denials at oral argument. Additionally, they challenge the method by which the statistics were formulated. First, while respondents *denied* the accuracy of the statistics, they did not *refute* them. Secondly, the prosecution and the trial court accepted the stipulation as to what the best available evidence would show.

Respondents also contest the Court's reliance upon the jury commissioners' affidavits. At the outset, the Court expresses its reluctance to decide a controversy on less than all the evidence; especially when such result is compelled by strict interpretation

of the rules of pleading and evidence. In any event, however, the Court stresses that a *prima facie* Sixth Amendment challenge was made out by petitioners, even without consideration of the affidavits. Their effect was, at best, cumulative. The affidavits would have been more probative of discriminatory intent with regard to the Fourteenth Amendment challenge. That issue, however, was not reached by the Court.

Page 4, paragraph 3 of the Court's memorandum will be amended to read, in part:

> Respondents' response to the present challenge was a mere denial. On October 17, 1979, respondents filed the affidavits of two former jury commissioners. Upon the Court's invitation . . . .

Respondents further contend that petitioners' *prima facie* case was rebutted by the affidavits of the former jury commissioners. They argue that the state may exempt women with child care responsibilities from jury service, and that the jury commissioners' actions were thus beyond attack.

The Court is of the opinion that respondents' reliance in this regard, fails to appreciate the crucial distinction between the instant case and the permissible scope of a jury exemption. Va. Code Ann. §8-208.6(26) (Cum. Supp. 1976) permitted the following people to seek exemption from jury service:

> Any persons who notify the jury commissioners within the time and in the manner prescribed by §8-208.10 that they have legal custody of and are necessarily and personally responsible for a child. . . during normal court hours.

The validity of this exemption, as written, was never questioned. What was in issue, and what respondents have yet to address, is the validity of the commissioners, rather than the individual women, claiming such exemption. In short, women were excluded without their invoking the exemption. The practice is reminiscent of womens' need to "opt-in" to jury duty as presented in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

Assuming, arguendo, that the commissioners' exclusion was permissible, the *prima facie* case would remain unrebutted. The commissioners' affidavits expressly state that they cannot

establish the extent of their exclusion for child care reasons. There thus remains an undetermined amount of under-representation which was not justified. Petitioners were thus entitled to the relief which they were afforded.

Finally, the Court is satisfied that the case proceeded in accordance with the approach of *Browder* v. *Director, Ill. Dept. of Corrections,* 434 U.S. 257 (1978); *Aston* v. *Warden, Powhatan Correctional Center,* 574 F.2d 1169 (4th Cir. 1978). The Court's November 19, 1979 order directed that the parties "submit any matters in *rebuttal*" that they deem necessary. The order of December 10, 1979 specifically referred to respondent's reservation on the issue of jury selection and noted that absent the presentation of additional evidence the Court would "proceed to render judgment on the instant record." The Court frankly is at a loss as to any more effective way to solicit a rebuttal to a *prima facie* case.

The Court will amend its memorandum as heretofore stated. Respondents' motions in all other respects are denied.

An appropriate order shall issue.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: January 9, 1980

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 79-0543-R

ROBERT G. EBY,

and

FRANKLIN M. PHILLIPS,

Petitioners,

v.

ANDREW J. WINSTON, et al.,

Respondents.

MEMORANDUM

Respondents, pursuant to Fed.R.Civ.P. 60(b)(6), filed a motion for relief from judgment on January 30, 1980. The motion rests upon respondents' assertion that the state trial judge did not accept the stipulation regarding the gender composition of the master jury list and the venire from which the petit jury was drawn. Respondents have also filed the affidavit of the Honorable Edward P. Simpkins, Jr., the presiding judge, in support of their motion. Petitioners have responded to said motion and the issue is thus ripe for disposition.

The purpose of a habeas corpus proceeding is to challenge the legality of the restraints on an individual's liberty. Under the circumstances presented by the instant action, the overriding issue is the Commonwealth of Virginia's right to confine petitioners. While the formal respondents are petitioners' custodians, the right to restrain petitioners' liberty is derivative of the same right of the Commonwealth.

The stipulation in question was entered into by counsel representing petitioners and the Commonwealth. A stipulation of fact voluntarily agreed upon by opposing parties is, absent special circumstances, binding upon those parties. *Marshall* v. *Emerson's Ltd.*, 593 F.2d 565 (4th Cir. 1979); *Maryland Casualty Co.* v. *Rickenbaker,* 146 F.2d 751, 753 (4th Cir. 1944). Respondents have offered no justification for releasing them from the stipulation.

Respondents again assert that the stipulation was not accepted by the trial judge. It may be assumed that the trial judge, as fact-finder in the pretrial motion, was free to weigh the probity of the evidence. That is not to say, however, that upon that basis respondents are no longer bound by the Commonwealth's stipulation.

The very reason asserted by respondents in paragraph 2 of the present motion counsels against the relief sought. The petition was decided without an evidentiary hearing, solely upon the state court records. Petitioners, at trial, did not offer evidence on the gender composition of the jury because the need for such proof was obviated by the stipulation. In seeking to avoid the effect of the stipulation, respondents would, on the one hand, expunge petitioners' evidence from the record, while on the other hand, condemn petitioners for the absence of such proof. Such contentions are not only illogical, but devoid of fairness on their face.

The motion will be denied, and an appropriate order will issue.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: Feb 12 1980

80-1353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ANDREW J. WINSTON, Sheriff,
City of Richmond,

and

DON HUTTO, Director of
Department of Corrections,

Petitioners

v.

ROBERT G. EBY

and

FRANKLIN M. PHILLIPS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ANDREW J. WINSTON, Sheriff,
City of Richmond,

and

DON HUTTO, Director of
Department of Corrections,
Petitioners

v.

ROBERT G. EBY

and

FRANKLIN M. PHILLIPS,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and set forth in petitioners' Appendix A. The decisions of the United States District Court are set forth in petitioners' Appendix B.

JURISDICTION

Petitioners claim that jurisdiction is founded upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a master jury list composed of twenty-five percent women meet the fair-cross-section of the community requirements of the Sixth Amendment?

II. Does the exemption from jury service of "women" necessarily and personally responsible for children sixteen years of age or younger represent a significant state interest to justify a failure to attain a fair-cross-section of the community under the Sixth Amendment?

III. Did the respondents make out a prima facie case of jury discrimination?

* * * *

STATEMENT OF THE CASE

The respondents generally accept the statement of the case set forth by the peti-

tioners except to their contention that the State trial judge rejected the stipulation between the State prosecutor and respondents. The stipulation regarding the gender composition of the master jury list and the venire from which the petit jury was drawn constituted the only evidence ever submitted in this regard.

ARGUMENT

I

A MASTER JURY LIST COMPOSED OF TWENTY-FIVE PERCENT WOMEN DID NOT REPRESENT A FAIR-CROSS-SECTION OF THE COMMUNITY UNDER THE SIXTH AMENDMENT.

Undeniably, a defendant in a criminal proceeding has a right to a jury drawn from a source reasonably representative of a fair-cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979). Otherwise, a jury would not be the voice of the entire community but an organ of special groups and

and classes.

In this case while 50% of the adult community population was female; only 25% of the master jury list,[1] only 20% of the examined venire, and only 17% of the jurors selected were women.[2] This underrepresentation of women on the master jury list during a two year period and on the respondents' jury panel was a substantial disparity in light of the process and mechanisms by which jurors were selected in Hanover County, Virginia. Turner v. Fouche, 396 U.S. 346 (1970). A review of this procedure by which potential jurors were selected will follow.

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[1] In the previous year, 1976, 24% of the master jury list were women.

[2] Contrary to petitioners' claim that respondents agreed to excuse two women from the list of 24 potential jurors, only one woman, Evelyn Melton Leadbetter, was excused -- by the Court -- as a result of her husband's interest in a certain property which the State prosecutor stated might be involved in the case.

First of all, the jury which convicted the respondents was selected under a system where "key"[3] people selected names from people they knew or heard about. This type of subjective system has been repeatedly criticized for its inherent tendency to foster discrimination. Castaneda v. Partida, 430 U.S. 482 (1977) and Hernandez v. Texas, 347 U.S. 475 (1954)

The jury commissioners for 1977 were not authorized to employ random selection techniques under the then optional alternative of the Va. Code Ann. §8-208.10 (Cum.Supp.1976). A random selection process is now mandatory in Virginia by statute.[4] §8.01-345 Va. Code Ann.

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[3]Four of the five jury commissioners who selected the master jury list were males.

[4]According to Virginia's Brief in Opposition to Grant Writ of Certiorari, Case #78-5796, October Term 1978, ". . . any decision by this Court in the present would apply to this case alone and would have no significant impact upon jury selection in Virginia." At p. 4. Interestingly enough, the Attorney General concluded that Brief by stating ". . . issues raised in this case are neither important nor substantial and that the Court should deny the petition for writ of certiorari." p.5.

Secondly, the commissioners were not aided by the existence of any objective standards that might have been readily applied uniformly. The testimony of the Jury Commissioners suggested they did not seek out qualified women in numbers reflective of their representation in the community; their only reported effort of obtaining a cross-section was in terms of geographical representation.

Lastly, at least two of the commissioners, as evidenced by their affidavits, intentionally and arbitrarily excluded from consideration those women who they knew cared for infant children.

In this regard, Virginia did authorize the exemption of persons who had legal custody of and who were necessarily and personally responsible for a child or children sixteen years of age or under <u>if such persons</u>

notified the jury commissioners.[5] (Emphasis supplied) However, only women with small children were summarily excluded from the master jury list; clearly in violation of the aforesaid statutory mandate. From the affidavits it is clear that the exemption was not applied uniformly to men and women alike and prospective women jurors were exempted from the master jury list without claiming the exemption. It is fundamental that a person who is exempted from jury duty may nevertheless elect to serve since an exemption is a personal matter which can be waived. Therefore, two Jury Commissioners did not comply with the procedures for jury selection pursuant to Va. Code Ann. §8-208.

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[5] In effect at the time of respondents' trial and reads as follows: Va. Code Ann. §8-208.6(26) (Cum.Supp.1976). Any persons who notify the jury commissioners within the time and in the manner prescribed by §8-208. 10 that they have legal custody of and are necessarily and personally responsible for a child . . . during normal working hours.

6(26). This non-compliance[6] with statutory mandates renders the jury illegal and invalidates its verdict. E. O. Ballard v. United States, 329 U.S. 187, 195 (1946) and Thiel v. Southern Pacific, 328 U.S. 217 (1946).

Thus, women were substantially underrepresented in a systematic, recurrent and uniform degree. This disparity, coupled with the selection process as discussed herein, satisfied the three-part test of Duren and established an unrebutted case of denial of a jury composed of a fair-cross-section of the community.

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[6]Petitioners conceeded non-compliance on Page 7 of their petition.

ARGUMENT

II

THE EXEMPTION FROM JURY SERVICE OF "WOMEN" NECESSARILY AND PERSONALLY RESPONSIBLE FOR CHILDREN SIXTEEN YEARS OF AGE OR YOUNGER DID NOT REPRESENT A SIGNIFICANT STATE INTEREST TO JUSTIFY A FAILURE TO ATTAIN A FAIR-CROSS-SECTION OF THE COMMUNITY.

Petitoners attempt to justify the exclusion of women from jury service under the theory that States have an important interest in the welfare of children is misplaced. As previously noted, the Jury Commissioners were never authorized to exempt only women caring for the young, and Va. Code Ann. §8-208.6(26) did not authorize the Commissioners to exempt anyone unless the prospective juror notified the Commissioner of his or her desire to seek an

exemption.[7] Above all, the respondents have never challenged the validity of the aforesaid exemption as written.[8] However, the statutory exemption was misapplied by the Commissioners and no State interest was served by their actions. In the face of Duren and Taylor v. Louisana, 419 U.S. 522 (1975) it belies logic to argue that the exclusion of women in violation of State law did not violate rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

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[7]There is no evidence that any woman who was caring for a child under sixteen years of age claimed the exemption by notifying the Jury Commissioners as proscribed by statute.

[8]Obviously the care of children is a matter of State importance and should be uniformly regulated.

ARGUMENT

III

THE RESPONDENTS CLEARLY MADE OUT A PRIMA FACIE CASE OF JURY DISCRIMINATION.

Petitioners argue that the statistics regarding the 1976 and 1977 master jury list composition by sex and the 1970 census figures for adult population of Hanover County by sex, all of which were stipulated to by the prosecution and respondents at the State Court trial, should have been disregarded by the District Court in considering respondents' habeas corpus petition. It should be noted that those stipulations constituted the only evidence submitted to either the State trial Court or in the instant habeas proceedings regarding the composition of the master jury lists by sex or the composition by sex of adult population from which the jury lists were drawn. Such stipulations have been

deemed conclusive of the facts, e.g., Dooley v. Commonwealth, 198 Va. 32, 35, 92 S.E.2d 348, 349 (1956), and preclude a later change in position by a party. E.g., McLaughlin v. Gholson, 210 Va. 498, 171 S.E.2d 816 (1970).

The petitioners have claimed that in denying respondents' Motion to Quash the Master Jury List, the State trial judge "rejected the stipulations as proving the facts." Indeed, the petitioners sought to impeach the State trial Court record with an affidavit of the trial judge executed more than two years after ruling upon the motion. As noted before, it would have been improper for the trial judge to ignore the stipulated facts. Dooley v. Commonwealth, supra. But even assuming arguendo, that the trial judge could have ignored the stipulated facts, he did not. An examination of the record reveals that the State trial judge made some quarrelsome comments, noting that women sometimes have names

normally identified with men (to which counsel responded that reference had been made not only to names, but also to forms of address, such as "Mrs.")and asserting that the stipulation established only "that this would be the evidence if you put it on" and "not a stipulation that it's an absolute fact." (to which counsel, who had previously noted in response to similar comments that the stipulated evidence was uncontradicted, answered, "There are very few absolute facts.") but never expressly rejected the stipulations. Moreover, the State trial judge's explanation of his ruling on the motion indicates that he accepted the stipulated percentages, but believed them insufficient to establish a denial of Constitutional rights. The trial judge stated:

> THE COURT: Well, the master jury list; I don't think there's any, uh, uh, uh -- the necessary proof or enough proof that the jury was --- master jury list was selected illegally. I don't think --- if you recall, one of

> the jury commissioners, you were talking about percentages and you all consented to all that, I don't think that's sufficient to throw out a master jury list. If you go that far, then you're going to say you've got to have -- find out how many reheaded men there are in the county and you've got to get the same percentage of redheaded men, etcetera. I just don't believe your argument on the jury list is sound at all." TR

As the District Court found, "the trial judge did not reject the statistical evidence, but merely emphasized its limitations."

The record conclusively established, as the District Court noted, that the stipulations of fact were entered into by counsel representing respondents and the prosecuting attorney. Since the petitioners offered no evidence showing why the stipulation was unreliable it should be accepted as relevant evidence. Castaneda v. Partida, 430 U.S.482 at 496 (1977). After all, Spanish names provided ready identification of the members of this class in Hernandez v. Texas, supra. Allow the petitioners to now be released from that

stipulation would as the District Court pointed out, work an extreme injustice.

> "The petition was decided without an evidentiary hearing, solely upon the State court records. Petitioners, at trial did not offer evidence on the gender composition of the jury because the need for such proof was obviated by the stipulation. In seeking to avoid the effect of the stipulation, respondents would, on the one hand, expunge petitioner's evidence from the record, while on the other hand, condemn petitioners for the absence of such proof. Such contentions are not only illogical, but devoid of fairness on their face."

See also, e.g., Marshall v. Emerson's Ltd., 593 F.2d 565 (4th Cir. 1979); Maryland Casualty Co. v. Richenbaker, 146 F.2d 751, 753 (4th Cir. 1944).

CONCLUSION

For the reasons presented, the respondents respectfully submit that the petitioners have failed to present any special or important reasons why their petition for Writ of Certorari

should be granted;[9] and therefore the petition should be denied.

Respectfully submitted,

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[9]Rule 17, Rules of the Supreme Court of the United States.

CERTIFICATE OF SERVICE

I, Michael Morchower, Esquire, counsel for the Respondents, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10th day of March, 1981, I mailed a copy of the foregoing brief in Opposition for Writ of Certiorari to J. Marshall Coleman, Attorney General of Virginia and James E. Kulp, Deputy Attorney General of Virginia, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219, Counsel of Record for Petitioners.

Michael Morchower

Michael Morchower

AFFIDAVIT OF SERVICE

In accordance with Rules of the Supreme Court of the United States, I hereby certify that I have this 10th day of March, 1981, filed the required copies of the Respondent's Brief In Opposition To Petition For Writ of Certiorari in the Clerk's Office of the Supreme Court of the United States.

BY: Barbara E. Grove

Lawyers Printing Co.
P. O. Box 1654
Richmond, Va. 23219

March 10, 1981

Sworn to before me this 10th day of March, 1981.

Cynthia J. Hray
NOTARY PUBLIC FOR VIRGINIA

My Commission Expires: 8/10/84